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# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 673

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the Tax Court (R. 18–24) is reported at 43 T.C. 120. The opinion of the court of appeals (R. 48–65) is reported at 363 F. 2d 1009.

### JURISDICTION

The judgment of the court of appeals was entered on July 6, 1966 (R. 66). By order of Mr. Justice Harlan dated October 4, 1966, the Commissioner's time for filing a petition for a writ of certiorari was extended to November 3, 1966 (R. 67). The petition was filed on October 13, 1966, and was granted on

December 5, 1966 (R. 68). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

When the resolution of an issue in a federal estate tax controversy depends upon the character of a property interest owned or transferred by the decedent and the character of such interest has been determined in a non-adversary State trial court proceeding to which the United States was not a party, is the federal court conclusively bound by that decision even though it is contrary to State law?

## STATUTES AND REGULATIONS INVOLVED

The relevant portions of § 2056 of the Internal Revenue Code of 1954 and the pertinent Regulations are set forth in the Appendix *infra*, pp. 39–43.

## STATEMENT

Herman J. Bosch, a resident of New York, died on April 6, 1957. He had created a revocable trust in 1930 which, as amended in 1931, directed that the income be paid to his wife during her life and granted her a general power to appoint the corpus by will to any "persons and/or corporations." In the event she failed to exercise that general power of appointment, the trust provided that half the corpus was to go to her heirs and half to decedent's heirs then living. In 1951 (five and one-half years before decedent's death), in an effort to prevent the corpus of the trust from being taxed as part of her gross estate at her death, decedent's wife executed an instrument which purported to release her general power of appointment and to convert it into a special power of

appointment.[1] (R. 4, 27–31, 33–34, 36, 37–38, 39–40.)

Decedent's executor claimed a marital deduction for the value of the *inter vivos* trust ($70,222). This trust would qualify for a marital deduction only if, at the time of decedent's death, his widow had possessed both the right to receive the income from the the trust for her life and a general power of appointment over the trust assets. It would not qualify for the marital deduction if she had only the right to the income plus a special power of appointment. 1954 Code, § 2056(b)(5) (App. *infra*, pp. 39–40). In view of the widow's prior release of her general power of appointment, the Commissioner determined that the *inter vivos* trust corpus did not qualify for the marital deduction.[2] The executor filed a petition in the Tax Court for a redetermination of the resulting deficiency (R. 3–6, 7).

The Tax Court controversy turned on whether the 1951 release by decedent's widow was, as she now

[1] If a person, at the time of his or her death, has a general power of appointment over a trust, the trust assets are included in his or her gross estate. If a person has only a special power of appointment, the trust assets are not included in his or her estate. 1954 Code, § 2041(a).

A general power of appointment for tax purposes is one which allows the holder to appoint to himself, his estate, his creditors, or the creditors of his estate. A power which cannot be exercised in favor of any of these four classes of appointees is a special power of appointment (even though it can be exercised in favor of any other person or corporation). 1954 Code, § 2041(b)(1).

[2] Although the Commissioner disallowed the marital deduction as to the *inter vivos* trust corpus, he allowed the decedent's estate a total marital deduction of $716,688 for other property interests bequeathed to the widow (R. 7).

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claims, invalid—in which case she would have possessed a general power of appointment at the time of her husband's death in 1957, and the trust would qualify for the marital deduction. While the Tax Court proceeding was pending, decedent's executor-trustee filed a petition in the New York Supreme Court seeking a determination of the validity of the widow's 1951 release. The Tax Court, with the Commissioner's consent, continued the Tax Court proceeding (R. 1–2, 23, 41–43).

In the State court action, three briefs were filed—one for the trustee, one for Mrs. Bosch, and one by a guardian *ad litem* on behalf of a minor who was a possible beneficiary in the event Mrs. Bosch died without exercising her power of appointment. All three briefs argued that the release was a nullity. No argument to the contrary was presented to the State court. The court adopted the unanimous position of the parties that the release was a nullity (R. 10–11, 14–15, 45–47).

Without discussing any New York statutes or decisional law, the Tax Court accepted the State trial court decision "as an authoritative exposition of New York law and adjudication of the property rights involved" (R. 24), and allowed the executor a marital deduction for the value of the *inter vivos* trust. In so doing, the Tax Court declined to decide whether it was bound by the New York trial court's decision (R. 24). A divided court of appeals affirmed. The majority held that it was required to accept the State trial court decision, even if that decision resulted from a non-adversary proceeding and was incorrect

under State law (R. 48–58). Judge Friendly, in his dissenting opinion, concluded, after a comprehensive discussion of the problem, that the State trial court was wrong as a matter of New York law in holding that the partial release was a nullity (R. 58–65). He also rejected the "mechanical view" adopted by the majority, under which the erroneous State trial court decision controlled for federal tax purposes despite the facts that (1) the parties to the State proceeding had no "genuine controversy," (2) the State trial court did not have "the benefit of a fair presentation of both sides" of the question, and (3) the "state court litigation [was] brought primarily to have an effect on federal taxes" (R. 58, 60, 64).

## INTRODUCTION AND SUMMARY OF ARGUMENT

Many federal tax cases turn on the taxpayer's rights and interests under State law. For example, whether particular property is includible in the decedent's taxable estate generally depends upon whether he owned the property or held some specified interest in it under State law. Similarly, an estate tax marital deduction is allowable for the value of certain property interests which, under the applicable State law, passed from the decedent to his widow at his death.

The question presented by this case—and by the companion *Second National Bank* case (No. 240, this Term, see fn. 6, p. 7 *infra*)—is whether a taxpayer can, by obtaining an erroneous decree from a State trial court in a non-adversary proceeding, bind the Commissioner on such an issue of State property law.

In the typical tax case, there has been no State court determination of the taxpayer's property rights, and it devolves upon the federal court to determine the taxpayer's property interests under State law. In keeping with the Rules of Decision Act, as interpreted by *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, the federal court must search out State law in order to resolve a federal tax question which depends on an issue of State law. This case raises the narrower question—how did Congress intend a property interest to be characterized for federal tax purposes when a State trial court has already determined that question?

## I

Since this Court last addressed itself to the effect of a State trial court determination in a subsequent federal tax proceeding more than thirty years ago in *Freuler* v. *Helvering,* 291 U.S. 35,[3] it has been left to the lower federal courts to decide what effect, in the light of *Freuler,* should be given to State trial court determinations of State law issues on which federal tax consequences turn. At least three different positions have emerged in the decisions of the courts of appeals[4]—two of which may be described as "polar" positions.

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[3] *Blair* v. *Commissioner*, 300 U.S. 5, as explained more fully below (p. 23), involves the question of the effect, for federal tax purposes, of a property determination by a State *appellate* court.

[4] The commentators, too, have suggested differing answers to the question of the effect to be given to State court decrees in federal tax controversies. See, *e.g.*, Braverman and Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 Tax L. Rev. 545 (1962); Cahn, *Local Law in Fed-*

The first is that any judgment of a State trial or probate court "which is effective as a determination of property rights among the parties is conclusive upon the federal fisc" (R. 58), and the federal courts are precluded from making any examination of the question, even if the State proceeding was non-adversary and reached an incorrect result. That approach, referred to as the *Gallagher* view, has been adopted only by the Third Circuit [5] and, in this case, by the Second Circuit.[6]

The great majority of the courts of appeals have rejected the *Gallagher* rule. Their decisions have reflected two principal approaches, some courts relying in part on both. Some of the decisions have lent support to the other "polar" position—that where federal tax consequences turn on the nature of a property interest held or transferred by a decedent, a State

*eral Taxation*, 52 Yale L.J. 799 (1943); Cardozo, *Federal Taxes and the Radiating Potencies of State Court Decisions*, 51 Yale L.J. 783 (1942); Colowick, *The Binding Effect of a State Court's Decision in a Subsequent Federal Income Tax Case*, 12 Tax L. Rev. 213 (1957); Holzman, *Impact of State Law upon Federal Taxation*, 42 Taxes 240, 277 (1964); Stephens & Freeland, *The Role of Local Law and Local Adjudication in Federal Tax Controversies*, 46 Minn. L. Rev. 223 (1961); Note, *Federal Court Recognizes State Determination of Property Rights Despite Nonadversity of State Proceeding*, 41 N.Y.U. L. Rev. 1007 (1966); Note, *Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination*, 33 Fordham L. Rev. 705 (1965); Note, *Effect of State Court Decrees in Federal Tax Litigation*, 30 U. of Chi. L. Rev. 569 (1963); Note, *The Role of State Law in Federal Tax Determination*, 72 Harv. L. Rev. 1350 (1959).

[5] *Gallagher* v. *Smith*, 223 F. 2d 218 (C.A. 3).

[6] A different panel of the Second Circuit refused to follow *Gallagher* in *Second National Bank of New Haven* v. *United States*, 351 F. 2d 489, certiorari granted December 5, 1966, No. 240, this Term.

trial court decision characterizing that interest can never be conclusively binding, since the federal courts are under a duty to make their own determination of the property interest in accordance with State law as determined by the highest court of the State. According to this view, Congress intended federal courts to ascertain the character of a taxpayer's property interests under State law in accordance with the approach of the Rules of Decision Act, 28 U.S.C. 1652, as interpreted by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, whether or not there has been a prior determination by a State trial court.

Although there is respectable support for the *Erie* approach, we urge an intermediate position—that a federal court is bound by a State trial court decision if it was rendered in an adversary proceeding but is not bound if the State proceeding was non-adversary. This approach is supported by clear indications of Congressional intent, by the pertinent policy considerations, by long-standing Treasury Regulations, by this Court's *Freuler* decision, and by the decisions of a majority of the courts of appeals; it also eliminates the potential unfairness inherent in both polar positions and achieves an appropriate accommodation of the respective roles of the federal and State courts in resolving tax controversies.

1. Persuasive evidence points to the conclusion that Congress did not intend the federal fisc and the federal courts to be bound by non-adversary State trial court decisions in which there was no genuine controversy between the parties and no full and fair presentation of both sides of the issue on which the federal

tax liability turns. For example, Congress specifically provided that only an interest passing from the decedent to his surviving spouse under his will or by operation of law could qualify for the marital deduction and, until the enactment of a recent and limited amendment, even a disclaimer of property by a legatee in favor of the surviving spouse could not serve to increase the marital deduction. 1954 Code, § 2056(d)(2) App. *infra,* pp. 40–41. Congress could not have intended the marital deduction to be augmented if a legatee disguised his disclaimer by participating in a non-adversary State trial court proceeding in which he voluntarily relinquished rather than asserted his rights under the decedent's will.

The legislative history of the marital deduction demonstrates that Congress intended no such anomalous result. The Senate Finance Committee Report recommending enactment of the marital deduction provision states that in ascertaining the property which passed to the widow under the decedent's will, the Commissioner and the federal courts should give "proper regard * * * to interpretations of the will *rendered by a court in a bona fide adversary proceeding.*" S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948–1 Cum. Bull. 331, 334) (italics added).

2. The Treasury Regulations have, since 1919, indicated that a taxpayer cannot bind the government by a non-adversary State court decree involving no "active and genuine contest." And the marital deduction Regulations, since their promulgation in 1949, have indicated that the government is not bound by a consent decree, but strongly suggest that it

will be bound by "a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest."

3. This Court's decision in *Freuler* clearly implied that a State trial court proceeding in which "all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax" would not be conclusive for federal tax purposes. Following this lead, six of the eight courts of appeals which have passed on the question have declined to give conclusive effect to erroneous State court decrees that resulted from nonadversary proceedings.

4. The non-adversary rule avoids the potential unfairness that is present under both polar positions. The *Gallagher* rule is unfair because the government is bound by an erroneous State trial court decree resulting from a proceeding to which it was not a party and in which there was no fair presentation of the position it advocates; and because it permits a taxpayer to use busy State trial and probate courts to effect posthumous intrafamily property dispositions aimed at avoiding estate taxes. Under the *Erie* rule, on the other hand, the litigant who vigorously but unsuccessfully asserts a position in an adversary State court proceeding must press that position to the highest State appellate court if he is to foreclose the possibility that a federal court will tax him as if he had won the State proceeding.

The *Gallagher* rule may properly be criticized because it gives too narrow, and the *Erie* rule because it

gives too broad, a role to the federal courts in resolving tax controversies turning on State law issues. The non-adversary rule achieves a salutary accommodation by restricting federal court re-examination of State decrees to those cases in which the State court proceeding was non-adversary, so that there was no real determination on the merits of the State law issue.

## II

In the instant case, decedent's estate would be entitled to a marital deduction only if, at the time of his death, his widow had a life estate in the trust plus a general power of appointment over the corpus. 1954 Code, § 2056(b)(5). No marital deduction would be allowed if, at the time of decedent's death, his wife had only a special power of appointment, even if, shortly after his death, all of his heirs conceded to her the additional power necessary to convert her special power into a general power of appointment. For, although she would then have a general power of appointment, she would neither have received it from her deceased husband nor would she have possessed it at the moment of her husband's death, both of which are essential to allowance of a marital deduction.[7] Therefore, decedent's estate should not receive a marital deduction merely because his heirs, in a non-adversary proceeding in which there was no genuine

[7] *Jackson* v. *United States*, 376 U.S. 503, 507–508; see also 1954 Code, § 2056 (a), and (e); S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 10 (1948–1 Cum. Bull. 331, 338). For a recent statutory amendment of limited scope to § 2056(b)(5), see *infra*, p. 16, fn. 14.

controversy and no full and fair presentation of both sides of the issue, obtained a State trial court's ratification of their voluntary relinquishment of powers to the widow.[8]

[8] Of course, an erroneous State court consent decree will be recognized as effecting an actual transfer of ownership of the property from the "losing" litigant to the "winning" litigant, just as a gift from one to the other would have done. Thus any future income from property transferred by an erroneous consent decree would be taxed to the new owner. The question involved in this case is whether the decree will be given *retroactive effect* as a determination that decedent's widow received the property from decedent and owned it "at the moment of her husband's death."

The same type of question can, of course, arise under the income tax laws. For example, if Mr. X owned certain income producing property, the annual income would be taxed to him. If, on January 1, 1967, he made a gift to his son of the property and its 1966 income, Mr. X would nevertheless be taxable on the 1966 income, since he owned the property at the time it was earned. Assume that Mr. X and his son were in business together and that, although there was some question under State law as to whether certain income producing property was owned by X or by his son, X would have prevailed if he had asserted his rights. Instead, when X's son sued him in a State trial court, claiming that he (the son) owned the property, X did not present any substantial defense to the claim, and the court on January 1, 1967, found that the son owned the property and also awarded the 1966 income to the son. Such a voluntary relinquishment of rights by the father should be taxed no differently than a gift, even though the gift has been judicially sanctioned. There is no question that after this decree the son owns the property and all income accruing *thereafter* is taxable to the son, just as it would have been if the father had given the property to the son. However, the federal court should not be precluded by the non-adversary State court decree from finding that the father had actually owned the property during 1966 and that he was taxable on the 1966 income.

## ARGUMENT

### I

### IN DECIDING AN ESTATE TAX CONTROVERSY, A FEDERAL COURT IS NOT BOUND BY AN ERRONEOUS STATE TRIAL COURT DETERMINATION RENDERED IN A NON-ADVERSARY PROCEEDING TO WHICH THE UNITED STATES WAS NOT A PARTY

#### A. THE *GALLAGHER* RULE

According to the Third Circuit's *Gallagher* rule,[9] which the Second Circuit adopted in the instant case, "a state court's adjudication which is final in its effect upon [State-created property] rights must also be taken as final as to tax matters which depend upon those rights."[10] It is, under this approach, irrelevant whether the State court decision was correct or incorrect and "whether the [State] proceeding was adversary or nonadversary."[11]

The *Gallagher* rule conflicts with the pertinent policy considerations and is contradicted by relevant indications of Congressional intent; it has also been rejected by the long-standing Treasury Regulations, by the majority of the courts of appeals, and is inconsistent with this Court's *Freuler* decision.

1. In following the *Gallagher* rule, the majority opinion in the instant case gave no weight to the fact that all parties to the State trial court proceeding

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[9] See *Gallagher* v. *Smith*, 223 F. 2d 218 (C.A. 3); *Darlington's Estate* v. *Commissioner*, 302 F. 2d 693, 694–695 (C.A. 3); *Beecher* v. *United States*, 280 F. 2d 202, 203–204 (C.A. 3); *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837, 841–842 (C.A. 3).

[10] *Darlington's Estate* v. *Commissioner*, *supra*, p. 694.

[11] *Gallagher* v. *Smith*, *supra*, p. 226.

adopted the same position and urged the same result—the one which would reduce the federal estate tax liability of decedent's estate. Nor did the majority even consider whether the State trial court decision was correct under State law. Instead, it reasoned that when a "party comes into the federal court with his rights already fixed by a decision of a state tribunal * * * [t]here is no occasion to inquire into the general law of the state to ascertain what those rights are" (R. 55).

From the premise that a State court decision fixes the rights of the parties to that action, the *Gallagher* rule draws the conclusion that the Commissioner, who was not a party, is also bound. Yet no persuasive reasoning serves to bridge the gap between premise and conclusion. The doctrine of finality does not supply that bridge. The court below correctly rejected any contention that the State decision binds the Commissioner as *res judicata* (R. 54).[12] It is equally clear that such State court judgments are not entitled to full faith and credit in federal tax actions.[13]

Under the *Gallagher* approach, the federal courts, in resolving tax controversies, are bound by all State court determinations, including those that are con-

[12] In *Frueler* v. *Helvering*, 291 U.S. 35, involving a similar issue as to the effect of a State court decree on a federal tax case, this Court held that the State decree there involved "Obviously * * * had not the effect of *res judicata*, and could not furnish the basis for the invocation of the full faith and credit clause * * *" (p. 43).

[13] As this Court has often held, that principle stands as a national equivalent to local doctrines of *res judicata*. *Riley* v. *New York Trust Co.*, 315 U.S. 343, 349, 356; *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201.

trary to State law and resulted from non-adversary proceedings brought solely to effect post-mortem tax reduction. Thus taxpayers are permitted to manipulate the estate tax burden by obtaining State court approval for what are essentially post-mortem intra-family property dispositions agreed upon by parties with a common interest in minimizing the impact of the federal estate tax. As Judge Friendly noted, the *Gallagher* rule adopted by the majority in the instant case "would permit citizens, unwilling to accept the tax consequences of actions taken by them or their decedents, to evade federal taxes by taking advantage of an unwitting lower state tribunal" (R. 58). Indeed, the lower court's approach necessarily assumes that Congress intended the outcome of a federal tax controversy to be controlled by an erroneous consent decree, issued by a State court at the behest of a decedent's heirs who unanimously joined in urging such decree solely to reduce the estate tax burden. In the many tax cases in which liability turns on the nature of the taxpayer's interest under State law, the effect of the *Gallagher* rule is to permit the taxpayer to eliminate the role of the federal courts in adjudicating federal tax controversies.

2. There is compelling evidence that Congress intended no such result. Congress specifically provided that only an interest passing from the decedent to his surviving spouse could quality for the marital deduction, and, until a 1966 amendment of limited scope, even a disclaimer by a legatee in favor of the surviving spouse could not serve to increase the marital deduction. 1954 Code, § 2056(d)(2) (App. *infra*, pp.

40–41).[14] It would be highly anomalous if this section prohibiting augmentation of the marital deduction by disclaimer could be circumvented by an erroneous, non-adversary State court decree, obtained through the legatee's acquiescence, granting to the surviving spouse property which under State law should have passed to the legatee.

Moreover, the legislative history demonstrates that Congress never intended the collection of federal estate taxes to be frustrated by a non-adversary State court proceeding confirming a post-mortem intra-family rearrangement of property aimed at reducing estate taxes. The 1948 Senate Finance Committee Report recommending enactment of the marital deduction provision states (S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948–1 Cum. Bull. 331, 334)):

> If the surviving spouse takes under the decedent's will, the interest passing to her is determined from the will. In this connection proper regard should be given to interpretations of the will rendered by a court in *a bona fide adversary proceeding*. [Italics added.]

3. Long-standing estate tax Regulations require the same conclusion. The marital deduction Regulations have, since their adoption in 1949, indicated that while a consent decree "will not necessarily be accepted" as

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[14] Congress in 1966 amended that section, effective after the years involved in this case. P.L. 89–621, 80 Stat. 872. The amendment generally permits an increased marital deduction in certain limited circumstances where a legatee other than the decedent's widow makes a prompt disclaimer of an interest which has the effect of increasing the bequest of the decedent's widow.

a proper construction of the decedent's will, "a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest * * * will be accepted [if] * * * the court passed upon the facts upon which deductibility of the property interests depends."[15] Treas. Reg. § 20.2056(e)-2(d)(2) (App. *infra*, p. 43).

The same approach is reflected in the Regulations under Code § 2053 which allow an executor to take a deduction against a decedent's gross estate for the decedent's debts. These Regulations have, since 1919, indicated that a State court decree purporting to decide that some one (*e.g.*, a member of the decedent's family) has an enforceable claim against his estate is *not* conclusive on the federal court unless the State court "actually passed upon the merits of the claim, * * * [which] will be presumed in all cases of an active and genuine contest." If, however, the State proceedings were non-adversary and the decree was "a

[15] The Regulations provide that "a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest" will be "presumed" to reflect the "enforceable rights of the surviving spouse in the decedent's estate." However, there is no suggestion that this "presumption" would be overcome in the case of a genuinely adversary State court decision if it were incorrect. In fact, the text of the Regulations clearly indicates the contrary. While, according to the Regulations, a consent decree "will not necessarily be accepted as a bona fide evaluation of the rights of the spouse," the clear implication is that when there has been "a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest, * * * such a decree *will be accepted* * * * to the extent that the court passed upon the facts upon which deductibility of the property interests depends" (emphasis added).

mere cloak for a gift" from the estate to the claimant, the decree "will not be accepted." Treas. Reg. § 20.2053–1(b)(2) (App. infra, pp. 42–43).[16]

4. An early decision of this Court also indicates that the mechanical *Gallagher* approach is incorrect. In *Freuler* v. *Helvering*, 291 U.S. 35, a trustee distributed the gross income of the trust to the life income beneficiaries without any reduction for depreciation. The life beneficiaries failed to report on their tax returns the amount attributable to depreciation, *i.e.*, they reported the amount distributed less the depreciation. The Commissioner asserted a deficiency against them; and, while the case was pending before the Board of Tax Appeals, the trustee sought approval of his accounts from a California trial court. Certain remaindermen filed objections. The State

[16] The Regulations under §§ 2056 and 2053 should be given great weight. Not only have they received congressional approval under the re-enactment doctrine (see, *e.g.*, *Fribourg Nav. Co.* v. *Commissioner*, 383 U.S. 272, 283; *Gammarano* v. *United States*, 358 U.S. 498, 510–511; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396–397; *Helvering* v. *Winmill*, 305 U.S. 79, 83), but also they involve contemporaneous constructions of statutes by those charged with "setting [their] machinery in motion" and, hence, are entitled to "peculiar weight" (*Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315). The § 2056 Regulation quoted above has been unchanged since it was adopted in 1949, interpreting the marital deduction provision enacted by Congress in the prior year. See Treasury Regulations 105 (1939 Code), Sec. 81.47a(g), as amended by T.D. 5699, 1949–1 Cum. Bull. 181, 202. Congress re-enacted § 2056 in 1954 without disturbing the administrative interpretation it had been given. Similarly, the § 2053 Regulation quoted above was first adopted in 1919—just three years after the modern federal estate tax was enacted. See Treasury Regulations 37 (Rev. 1919), Art. 39. In the intervening years, Congress has re-enacted that section many times without altering the interpretation it had been given.

court found that the amounts representing depreciation should not have been distributed to the life income beneficiaries, and ordered the latter to repay the trustee an amount equal to the depreciation. Congress had provided (in a section of the then applicable Revenue Act, since repealed)[17] that a trust beneficiary is taxed on trust income which, pursuant to the "order governing the distribution, is distributable." This Court held that under this provision a federal court was bound to accept the distribution "order" entered by a State trial court, at least where that judicial proceeding was not "collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax" (p. 45).

The instant decision, however, rejects the plain implication of *Freuler,* by holding that a State trial court decision is binding for federal tax purposes even though the State proceedings were both (a) non-adversary and (b) brought to reduce federal taxes.

5. Finally, the majority of the courts of appeals have rejected the *Gallagher* approach. See *In re Sweet's Estate,* 234 F. 2d 401, 404, fn. 2 (C.A. 10), certiorari denied, 352 U.S. 878; *Old Kent Bank & Trust Co.* v. *United States,* 362 F. 2d 444, 449, 450 (C.A. 6); *Pierpont* v. *Commissioner,* 336 F. 2d 277, 281 (C.A. 4), certiorari denied, 380 U.S. 908; *Saulsbury* v. *United States,* 199 F. 2d 578, 580 (C.A. 5), certiorari denied, 345 U.S. 906; *Faulkerson's Estate* v. *United States,* 301 F. 2d 231, 233 (C.A. 7), certiorari denied, 371 U.S. 887; *Stallworth's Estate* v. *Commis-*

[17] Revenue Act of 1921, c. 136, 42 Stat. 227, § 219(d), repealed by Revenue Act of 1924, c. 234, 43 Stat. 253, § 219.

*sioner,* 260 F. 2d 760, 763 (C.A. 5); *Peyton's Estate* v. *Commissioner,* 323 F. 2d 438, 443–444 (C.A. 8); *Stark* v. *United States,* 351 F. 2d 160, 163 (C.A. 6), certiorari denied, 384 U.S. 939. Compare *Newman* v. *Commissioner,* 222 F. 2d 131, 136 (C.A. 9), and *Wolfsen* v. *Smyth,* 223 F. 2d 111, 113–114 (C.A. 9), with *Flitcroft* v. *Commissioner,* 328 F. 2d 449, 453–454 (C.A. 9).

B. THE *ERIE* VIEW

According to the other "polar" view, the so-called *Erie* approach, the federal courts in tax cases are never bound by a State trial court decree. This view rests on the premise that Congress intended a federal court, faced with a tax case turning on a question of State law, to determine State law in accordance with the Rules of Decision Act, 28 U.S.C. 1652, and *Erie R. Co.* v. *Tompkins,* 304 U.S. 64—that is, the State law question must be decided by ascertaining how the highest court of the State would decide that issue.[18]

As this Court has indicated, a recent decision of a State's highest court provides a rule of decision that federal courts must follow. Compare *Erie R. Co.* v. *Tompkins, supra,* with *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 204–205. State trial court decisions, however, do not necessarily provide such a rule of de-

[18] The Rules of Decision Act and *Erie* apply whether federal jurisdiction is based upon diversity or (as in a federal tax case) upon the presence of a federal question. See Friendly, *In Praise of Erie—And of the New Federal Common Law,* 39 N.Y.U. L. Rev. 383, 408, fn. 122 (1964); *Maternally Yours* v. *Your Maternity Shop,* 234 F. 2d 538, 540–541, fn. 1 (C.A. 2); Hart and Wechsler, *The Federal Courts and the Federal System,* 697 (1953).

cision. *Beals* v. *Hale*, 4 How. 37; *King* v. *Order of Travelers*, 333 U.S. 153. As pointed out by Judge Parker,[19] the function of preserving uniformity in the law as administered throughout a jurisdiction is served by appellate court decisions rather than by trial court decisions to which the doctrine of *stare decisis* is ordinarily inapplicable. The decision of a trial court may conflict with decisions of similar courts of the State and may be contrary to decisions of the State's higher courts.

A State trial court decision does not more accurately reflect State law merely because it binds one of the parties to the federal action. It would be incongruous if an erroneous State trial court decision—which no State court is bound to follow—controlled the outcome of a federal tax controversy and thus bound the federal fisc and the federal courts. Yet the *Gallagher* rule would require such a result.

There is no indication that Congress intended the federal courts in determining tax controversies to be bound by a State trial court decision which (1) is contrary to State law, (2) would have no *stare decisis* effect within the State, and (3) would doubtless have

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[19] Parker, *Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits*, 35 A.B.A. J. 19, 22 (1949):

"Trial courts exist to administer justice between litigants, appellate courts to preserve uniformity in the law as administered throughout the jurisdiction. A decision of the trial court means nothing more than that the trial judge thinks the law to be as he has declared it, and no other judge is bound to follow his decision. A decision of an appellate court means that the law as declared by it is settled and declared for the territory for which it has jurisdiction and must be followed by all courts within that territory until overruled or reversed."

been reversed if an appeal had been taken. The statement in the Senate Finance Committee Report on the marital deduction provision, *supra,* pp. 16–17, simply requires that "'proper regard'' be given to a decree entered in "a bona fide adversary proceeding." According to the *Erie* rule, "proper regard'' would be given to a litigated State trial court decision by treating it as some indication of how the highest State court would decide that issue, but it could not preclude the federal courts from making any inquiry at all into whether that decision was in accord with the law of the State as determined by the highest State court.

Thus, the Seventh Circuit in *Brainard* v. *Commissioner,* 91 F. 2d 880, in a federal tax case, expressly held that it was not bound by a State trial court decree, stating (pp. 883–884):

> Appellant * * * has presented to us a duly authenticated decree of the circuit court of Cook county, Illinois, in a case wherein this appellant filed his complaint in chancery, against his wife and mother, for the construction of this trust with respect to the question now before us. * * * With due deference to that court, however, we cannot accept the ruling as an expression of the judgment of the state of Illinois as to the property rights of her citizens in the interpretation of the local laws. That court's jurisdiction is limited to Cook County, and there are close to a hundred other circuit courts in Illinois of equal jurisdiction which are not bound by the rulings of the Cook county circuit court. For the interpretation of the laws of Illinois, we must look to the de-

> cisions of the Supreme and Appellate Courts of that state, for their rulings are binding upon all the inferior courts of Illinois.
>
> It is no doubt true that the proffered decree is binding upon the parties to that suit, and it will not be appealed from, because all parties thereto are satisfied with it; but we think it can not be binding on the government, which was not a party, and which of course has no right of appeal.

This Court's decision in *Blair* v. *Commissioner,* 300 U.S. 5, decided before *Brainard,* is not inconsistent with the *Erie* approach. In that federal tax proceeding, the federal court was required to follow a decision obtained by a taxpayer from a State intermediate appellate court which had, as this Court emphasized, "reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion" (p. 10).

We acknowledge that, with the possible exception of the *Brainard* case, no federal court of appeals has actually adopted the *Erie* rule. Most of the courts of appeals that have declined to attribute conclusive effect to State court decrees appear to have done so primarily, and certainly with considerable emphasis, on the ground that the decrees resulted from non-adversary proceedings in which both sides of the crucial issue were not fairly presented to the State court. However, many courts of appeals have also discussed and apparently relied somewhat upon the *Erie* approach. See, *e.g., Old Kent Bank and Trust Co.* v. *United States, supra,* p. 449; *Second National Bank of New Haven* v. *United States, supra,* certiorari granted, No. 240, this Term; *Faulkerson's Estate*

v. *United States, supra,* pp. 232–233; *Peyton's Estate* v. *Commissioner, supra,* p. 443; *Flitcroft* v. *Commissioner, supra,* pp. 455, 458–459.

The majority in this case did not reject the proposition that in a federal tax case where there has been no prior determination by a State court of the taxpayer's property interest, the federal courts must determine, in accordance with the Rules of Decision Act and *Erie,* how the highest State court would characterize the property interests. However, the majority below held that the Rules of Decision Act and *Erie* do not apply where a State trial court decision on the issue presented in the federal action has been obtained by a party to that action (R. 54–55). The opinion of this Court in *West* v. *A.T.&T. Co.,* 311 U.S. 223, however, may cast doubt on that view. The issue in *West* was the effect to be given in a federal action to a prior decision of a State intermediate appellate court in a case *between the same parties.* This Court began its analysis with the statement that "the state 'laws' which, by § 34 of the Judiciary Act of 1789 (the Rules of Decision Act) * * * are made 'the rules of decision in trials at common law' define the nature and extent of petitioners' right" (p. 236). The Court then held that a State intermediate appellate court decision provides a rule of decision that a federal court must follow unless it "is convinced by other persuasive data that the highest court of the state would decide otherwise" (p. 237). Thus, *West* can be read as indicating that a federal court may disregard a State intermediate appellate court (and *a fortiori* a State trial court) decision determining the

rights under State law of a party to the federal action, if the federal court is persuaded that the highest court of the State would have decided otherwise.[20]

While there is therefore some support in logic and in the decided cases for the *Erie* view, we believe that certain pragmatic considerations counsel against adopting that approach in its full sweep. As Judge Friendly stressed below, a holding that a federal court can never be bound by an erroneous determination of a State trial court "could operate unfairly in the many cases where persons having a genuine controversy over property rights desire resolution by an appropriate local tribunal without wishing to press their differences to the highest court of the state" (R. 58). For under the *Erie* view, a losing litigant who does not appeal to the highest State court runs the risk of being taxed as if he had won. The losing party in a non-adversary State proceeding has no real complaint if the federal court concludes that he should have won, since he voluntarily relinquished rather than

[20] *West*, however, does not necessarily so hold. The court of appeals in *West* had not passed upon the *res judicata* or collateral estoppel effect of the prior State court proceeding between the same parties. 108 F. 2d 347 (C.A. 6). The last paragraph of this Court's *West* opinion implies that it too declined to pass on these questions, and left them open on remand. 311 U.S. 223, 241. The court of appeals' opinion on remand suggests the same conclusion. 121 F. 2d 142, 143. It is thus altogether possible that this Court, having decided *Erie* only a few years before, chose the *West* case as an appropriate vehicle for deciding the effect to be given to decisions of a State intermediate appellate court, and treated the earlier State appellate case as if it had involved different parties, leaving for remand any possible *res judicata* or collateral estoppel effects of the previous State case.

asserted his rights in the State court. However, the same cannot be said of the losing party in a genuinely adversary State trial court proceeding.[21]

The *Erie* approach, moreover, necessarily requires the federal courts in every tax case to re-examine the decisions of lower State courts without regard to the circumstances in which they were rendered. Due regard for federal-State relationships counsels that wherever appropriate a federal court should avoid the conflict that may result when it re-examines State court decisions defining State property interests. This, we submit, can best be accomplished by adopting an intermediate position under which a federal court follows a State trial court decree unless it resulted from a non-adversary proceeding. In this way federal court re-examination of State law issues can be restricted to those cases in which there has been no real determination of such issue, while at the same time ensuring that a taxpayer cannot effect post-mortem estate tax reduction by obtaining an erroneous decree from a State trial court in a non-adversary proceeding.

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[21] Of course, as explained *supra*, p. 12, fn. 8, the Commissioner recognizes even an erroneous nonadversary decree which is "a mere cloak for a gift" (see supra, p. 18) as effecting a transfer of the property in question on the date of the decree, just as a gift of that property would have done. However, the *Gallagher* rule gives such a disguised gift *retroactive* effect and requires the Commissioner to treat the taxpayers as if the transfer had taken place at some time in the past (*e.g.*, at the time of decedent's death) and in some specified manner (*e.g.*, under the decedent's will), although the actual transfer of rights took place at the time of the erroneous, non-adversary decree and was from the legatee to the widow.

Moreover, the *Erie* rule is apparently inconsistent with the long-standing Treasury Regulations, which as discussed *supra,* pp. 17–18, strongly suggest that "a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest * * * will be accepted" for estate tax purposes.[21a]

C. THE NON-ADVERSARY APPROACH

There are compelling indications that Congress did not intend that the federal fisc and the federal courts should be bound by a decision arising out of a non-adversary State trial court proceeding which involved no genuine controversy between the parties and no full and fair presentation of both sides of the issue on which the federal tax turns. Congress clearly provided that a property interest cannot qualify for the marital deduction unless it passed to the surviving spouse from the decedent at, or in some cases, before his death. 1954 Code, § 2056 (a), (d)(2), (e) (App. *infra,* pp. 39–42); *Jackson* v. *United States,* 376 U.S. 503. This rule was complemented by § 2056(d)(2), which, until 1966, provided that a legatee could not increase the marital deduction by disclaiming his inter-

[21a] If the choice were solely between the *Gallagher* rule and the *Erie* approach, we would urge the latter. The collection of federal taxes should surely not depend upon a State court determination rendered in a context which furnishes no assurance that the matter has been given meaningful consideration. The *Erie* approach, on the other hand, avoids this danger. We advocate the intermediate rule as set forth in this brief because we believe that it better accommodates the conflicting interests, consistent with Congress' purpose, than the full rigor of the *Erie* approach. Should the Court reject this rule, however, we urge it to adopt the *Erie* rather than the *Gallagher* approach.

est in favor of the widow.[22] There is no reason to believe that Congress intended to allow an increased marital deduction if a legatee disguised his disclaimer by participating in a non-adversary State judicial proceeding in which he failed to assert his rights. The decree obtained in such a proceeding does not reflect the rights the legatee would have had if he had asserted them; it merely confirms his voluntary relinquishment of those rights through an agreement unanimously reached by the affected parties.

Congress could scarcely have intended to require the federal courts independently to examine and apply State law when there has been no State court decree, but at the same time to prohibit the federal courts from making any examination of State law if a taxpayer, by participating in a non-adversary State proceeding, has obtained a judicial imprimatur for a post-mortem plan to reduce the estate tax burden. This is shown by the statement in the Senate Finance Committee Report on the marital deduction provisions that "proper regard should be given to interpretations of the will rendered by a court in a *bona fide adversary proceeding.*" S. Rep. No. 1013, *supra* (emphasis added). Thus Congress did not contemplate that when an estate tax controversy turns on what interest the decedent owned or bequeathed, the parties need only agree to relinquish rights that will reduce the federal estate tax burden and have their agreement embodied in a consent decree approved by a State probate or trial court in order

[22] See *supra*, fn. 14, p. 16, for a discussion of the 1966 amendment of limited scope to § 2056(d)(2).

to determine once and for all the estate tax controversy. As Judge Friendly pointed out (R. 65, fn. 6), "In the absence of contrary congressional direction the United States is entitled to litigate liability for federal taxes in its own courts. Compare *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957)." [23]

The non-adversary rule both eliminates the unfairness inherent in the other approaches and results in a minimal intrusion by the federal courts into the characterization of property interests under State law—which is primarily a function of State courts. The federal courts' role is restricted to two categories of cases—(1) those where the issue did not come before any State court; and (2) those in which the issue was nominally passed upon by a State court, but was neither genuinely litigated nor determined on the merits because of the absence of a real controversy between the parties to the cause. By thus restricting the cases in which federal courts can make independent characterizations under State law, appropriate recognition is accorded to the fact that where a State court has been fully informed of the relevant facts and legal precedents and the proceedings have been conducted in such a manner as to indicate that each side seeks to prevail, the decision of the State trial court does, in fact, constitute a considered determination on the merits of the property interest at

[23] See 28 U.S.C. 1340, 1346, 1491; 26 U.S.C. 7442; see also, *e.g.*, *Flora* v. *United States*, 326 U.S. 145; *Quinn* v. *Hook*, 231 F. Supp. 718, affirmed *per curiam*, 341 F. 2d 920 (C.A. 3); *Falik* v. *United States*, 343 F. 2d 38, 41–42 (C.A. 2); *Cooper Agency, Inc.* v. *McLeod*, 235 F. Supp. 276, affirmed *per curiam*, 348 F. 2d 919 (C.A. 4).

issue. In such circumstances, it seems appropriate that the federal courts, for tax purposes, follow the State court's determination of the State law issue.[24]

This approach, as noted earlier, is also supported by long-standing Treasury Regulations which strongly suggest that "a decision of a local court" will not "be accepted" unless rendered "upon the merits in an adversary proceeding following a genuine and active contest" (see *supra,* pp. 17–18), and *Freuler* v. *Helvering,* 291 U.S. 35, 45, which required the lower federal court to follow a State decree that was not "collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional tax."

A large majority of the courts of appeals have followed the terminology of *Freuler* and used the word "collusive" to designate those proceedings in which there was no genuine conflict between the parties and no fair presentation of both sides of the controversy. See, *e.g., Saulsbury* v. *United States,*

[24] To be sure, application of this principle might in a particular case result in a federal court being required to follow a State trial court determination which, although rendered in an adversary proceeding, appears egregiously wrong. A possible solution would be to hold that a federal court is obliged to accord great deference to a State trial court determination rendered in an adversary proceeding but is not bound to follow it in the extraordinary case where it concludes that the decision is manifestly erroneous. For the reasons given in the text, we believe, however, that a State court decree rendered in an adversary proceeding should be followed in subsequent federal tax litigation without examination of its correctness.

*supra*, p. 580; *Peyton's Estate* v. *Commissioner, supra*, p. 444; *Old Kent Bank and Trust Co.* v. *United States, supra*, p. 453; *In re Sweet's Estate, supra*, p. 404; *Newman* v. *Commissioner, supra*, p. 136. Thus, in *Saulsbury*, the Fifth Circuit stated that (p. 580)—

> it does not affirmatively appear that [the State trial court's] order was obtained in an adversary proceeding and that there was no collusion. By the word *collusion*, we do not mean to imply fraudulent or improper conduct, but simply that all interested parties agreed to the order and that it was apparently to their advantage from a tax standpoint to do so. * * *

Compare *Stallworth's Estate* v. *Commissioner, supra*, p. 763 ("If the Alabama suit was nonadversary in character it is not binding"). Since "collusive" commonly has a perjorative connotation and since it tends to obscure rather than highlight the factors which make it appropriate to reject a State trial court decree as conclusive, there is little to commend its continued use in this context, in place of the more accurate phrase "non-adversary."

In determining whether a proceeding was adversary, a number of factors must be taken into consideration. The taking of an appeal, for example, would be significant. Cf. *Blair* v. *Commissioner, supra*, and see *Kelley's Trust* v. *Commissioner*, 168 F. 2d 198 (C.A. 2). Whatever other factors are relevant, it is clear that the proceedings in the New York trial court in the instant case were non-adversary since they involved no controversy between the parties and there was no full and fair presentation of both sides of the issue.

## II.

### APPLICATION OF THE NON-ADVERSARY APPROACH TO THE INSTANT CASE WOULD REQUIRE REVERSAL

The ultimate question in this case is whether decedent's estate is entitled to a marital deduction for the assets in the revocable *inter vivos* trust created in 1931 (R. 3–5). For the estate to obtain that deduction, decedent's widow must have had a life estate in the trust plus a general power of appointment over the corpus at the time of decedent's death. 1954 Code, § 2056(b)(5); *Jackson* v. *United States, supra.*

Approximately five years before her husband's death, Mrs. Bosch had (in 1951) executed a partial release of her general power of appointment, purporting to convert it to a special power in order to prevent the corpus from being included in her gross estate for federal estate tax purposes (R. 39–40).[25] While the Tax Court proceeding in this case was pending, decedent's executor-trustee, in an effort to qualify the corpus of the trust for the marital deduction, obtained a decree from the Supreme Court of New York that the partial release was a nullity (R. 41–43, 45–47). The record clearly shows that this decision was erroneous under New York law and that the proceedings which gave rise to it were non-adversary.

#### A. THE STATE TRIAL COURT PROCEEDINGS WERE CLEARLY NON-ADVERSARY

As Judge Friendly observed, "The only reason advanced by the trustee for seeking a declaration as to the validity of the release was the effect on the trust's

[25] See *supra*, p. 3, fn. 1.

liability for its share of the taxes on Mr. Bosch's estate" (R. 63; see also R. 41–43). If the trustee, Irving Trust Company, was prompted to file the petition by a desire to reduce the federal taxes on decedent's estate, that desire appears to have been shared by the executor of decedent's estate—also the Irving Trust Company—as well as by Mrs. Bosch, and by a guardian *ad litem* representing a minor who was a possible beneficiary in the event Mrs. Bosch died without exercising her power of appointment—all of whom submitted briefs arguing that the release was a nullity (R. 10–11, 14–15, 43).

Thus, it is conceded that all briefs filed in the State trial court "took the same tack or presented the same side of the argument" and that "nobody raised a dissenting voice" (R. 15). With all of the parties arrayed on the same side of the issue and urging the same result, the State action was obviously not initiated in order to resolve a genuine controversy between the parties. Rather, what the parties really sought was a ratification by the New York court of their unanimous contention—a contention designed to reduce federal estate taxes and to resolve a tax controversy with the Commissioner, albeit he was not a party to the New York proceeding.[26]

### B. UNDER NEW YORK LAW THE RELEASE EXECUTED BY DECEDENT'S WIDOW WAS VALID

While we do not ask this Court to decide the State law question whether the release was valid, we briefly

[26] In fact, the parties made it clear to the State trial court that all of them favored a decision that the release was invalid since that would save the family a substantial amount of federal estate tax (R. 43, 15).

discuss the relevant New York law to illustrate the dangers of permitting non-adversary State trial court proceedings to control the resolution of federal tax controversies.

Generally, a power of appointment created by a revocable trust is regarded as being vested subject to divestment and as releasable by the donee. *Restatement, Property,* § 334 (1940); 1 Scott, *Trusts,* § 57.1 (1939); cf. *Van Cott* v. *Prentice,* 104 N.Y. 45, 10 N.E. 257. When Congress passed the Revenue Act of 1942 imposing an estate tax on the holder of a general power of appointment unless released by a specified date,[27] New York, along with some 28 other states,[28] enacted laws designed to remove any doubt as to the ability of the holders of such powers to release them and thus qualify for the Congressional tax relief measure. New York's statute, passed in 1943, provided that "Any power which is exercisable * * * by deed or will, or otherwise * * * is releasable * * *." New York Real Property Law, 49 McKinney's Consolidated Laws of New York Annotated, § 183.

The State trial court nevertheless held that Mrs. Bosch's power of appointment—which was exercisable by will—was not releasable in 1951 since she did not have the right to exercise it at that time (R. 45–47). That court relied upon an 1888 decision, *Matter of Pifford et al.,* 111 N.Y. 410, which held that the donee of a power of appointment granted by will could not *exercise* that power prior to the death of the settlor

[27] Revenue Act of 1942, c. 619, 56 Stat. 798, 942, 944, §§ 403. 403(d)(3).

[28] See 3 Powell, *Real Property,* § 394 (1966).

but that the settlor's will should, nevertheless, be read as incorporating the donee's disposition. The State trial court did not mention *Matter of Woodcock,* 19 Misc. 2d 268, 186 N.Y.S. 2d 447, 450 (Surr. Ct. Westchester Co., 1959), which held that § 183 permits a donee to release a power of appointment prior to the time the power is exercisable. See also *Matter of Nicholas,* 204 Misc. 965, 126 N.Y.S. 2d 277 (Surr. Ct., Suffolk Co., 1953), modified on other grounds, 284 App. Div. 971, 134 N.Y.C. 2d 809 (1954), affirmed 308 N.Y. 971 (Ct. App., 1955); *Application of Chase National Bank,* 102 N.Y.S. 2d 124 (S. Ct. N.Y. Co., 1950); *Matter of Hodsdon,* 31 Misc. 2d 93, 219 N.Y.S. 2d 671 (Surr. Ct., Kings Co., 1961). The view that under § 183 the holder of a power of appointment exercisable by will may release his power *inter vivos* is consistent with both the language of that section and its purpose.[29] Thus, as Judge Friendly concluded, the partial release by Mrs. Bosch of her general power of appointment in 1951 was clearly valid under New York law (R. 60–64).

As we have shown, the proceedings in the New York court did not involve a genuine controversy and the

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[29] The ability of a donee to release a power of appointment even though not exercisable at the time of release has recently been affirmed by an amendment to the New York Real Property Law. 49 McKinney's Consolidated Laws of New York Annotated, § 146 (Supp. 1966). The amendment precludes donees of powers not presently exercisable from contracting to make an appointment but carefully states that "this section shall not, in any way, abridge the ability of the donee of a power of appointment not presently exercisable, to release his power, in whole or in part, pursuant to the provisions of [183's successor]." See Note, 65 Col. L. Rev. 1294 (1965).

parties did not make a full and fair presentation of both sides of the issue to the court. In fact, so far as the record shows, none of the parties even cited cases such as *Matter of Woodcock* and *Matter of Nicholas* to the State trial court. As Judge Friendly observed, "Under these circumstances it is not to be wondered that a judge sitting in the busy motion part of the Supreme Court for New York County should have erroneously ratified the parties' unanimous contention, citing only the inapposite decision of *In re Piffard*" (R. 64).

Although the record demonstrates that the proceedings in the New York trial court were both nonadversary and erroneous, the courts below did not specifically address themselves to these issues. The case should therefore be remanded for findings on these points.

## CONCLUSION

For the reasons stated, the judgment below should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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*In lieu of the Solicitor General, who has disqualified himself.